83-2008

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

DON RAY PHINNEY,

Petitioner,

vs.

FIRST AMERICAN NATIONAL BANK,

Respondent.

SUPPLEMENTAL APPENDIX

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IN THE UNITED STATES DISTRICT COURT FOR THE

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

DON RAY PHINNEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 74-298-NA-CV
	)	
FIRST AMERICAN NATIONAL BANK,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

The plaintiff Mr. Don Ray Phinney moved the Court to relieve him of the final judgment of June 1, 1979 herein for the defendant First American National Bank (bank) for a reason he claims justifies relief from its operation. Rule 60 (b) (6), Federal Rules of Civil Procedure.[1/] He claims the trial judge was required mandatorily

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1/ **** On motion and upon such terms as are just, the court may relieve a party *** from a final judgment *** for *** any other reason [than those specified in sub-§§ (1)-(5), inclusive, of the same sub-§ hereof] justifying relief from the operation of the judgment. **** Rule 60 (b)(6), supra.

to disqualify himself under the circumstances herein, 28 U.S.C. §455(b)(2), (4),[2/] and that failure of the trial judge to disqualify himself justifies his relief from the operation of the judgment against him.

"The objective of §455 was to deal with the reality of a positive disqualification by reason

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[2/] "*** Any *** judge *** of the United States shall *** disqualify himself in the following circumstances:

* * * * * *

"Where in private practice he served as lawyer in the matter in controversy ***;

* * * * * *

"He knows that he, individually or as a fiduciary, or his spouse ***, has a financial interest in the subject matter in controversy. ***"

28 U.S.C. §455(b)(2), (4), supra. While there seems to be reliance also on the provisions of 28 U.S.C. §455(a), the "impartiality [of the trial judge which] might reasonably be questioned" therein may be waived, and "waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification." 28 U.S.C. §455(e). There was a substantial disclosure on the record, and, as this Court understands, the plaintiff concedes such waiver but claims he should not be bound by it under all the circumstances presented. The trust hereof, therefore, goes to the claim that the trial judge should have disqualified himself sua sponte as to the grounds for disqualification enumerated in sub-§ (b) of §455 as to which "[n]o judge *** shall accept from the parties to the proceeding a waiver ***," 28 U.S.C. §455(e), supra.

of an interest or the appearance of a possible bias. The House and Senate Reports on §455 reflect a constant assumption that upon disqualification of a particular judge, another would be assigned to the case. For example:

> "'[I]f there is any reasonable factual basis for doubting the judge's partiality, he should disqualify himself and let another judge preside over the case.' S. Rep. No. 93-419, at 5 (1973) (emphasis added); H.R. Rep. No. 93-1453, at 5 (1973) (emphasis added), U.S. Code Cong. & Admin. News 1974, pp. 6351, 6355. ['] The reports of the two Houses continued:
>
> "'The statutes contain ample authority for chief judges to assign other judges to replace either a circuit or district court judge who becomes disqualified [under §455].' S.Rep.No. 93-419, supra, at 7 (emphasis added); H.R.Rep.No. 93-1453 supra, at 7 (emphasis added), U.S. Code Cong. & Admin. News 1974, p. 6357.

"***The declared purpose of §455 is to guarantee litigants a fair forum in which they can pursue their claims.***" United States v. Will, 449 U.S. 200, 101 S.Ct. 471, 481, 66 L.Ed.2d 392 (1980).

Mr. Phinney asserts that he was deprived of a fair forum in which to pursue his claim when the trial judge herein misapplied the concededly appropriate standard in this Circuit of determining

a motion for a judgment notwithstanding the verdict of the jury,[3/] Rule 50 (b), Federal Rules of Civil Procedure, as enunciated in Morelock v. NCR Corp., 586 F.2d 1096 (6th Cir. 1978). He is proscribed from this effort to make out an appropriate case for the mandatory recusal by the trial judge on the basis of the determination by the trial judge of the defendant's motion for a judgment notwithstanding the jury's verdict; he may rely only "*** on extra-judicial conduct rather than matters arising in the judicial context. Davis v. Board of Commissioners of Mobile County, supra, 517 F.2d [1044] at 1052 [5th Cir. 1975], cert.den. 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976)] (construing amended §455(a) in pari materia with 38 U.S.C. §144, the other federal disqualification statute).

[3/] The plaintiff set-forth in aid of his motion under Rule 60(b) (6), supra, a reference to an accompanying memorandum of points and authorities and, by argument in the latter document, delineated a listing of four points wherein he claims "the judge violated the [Morelock] rule and in effect became the all-powerful 13th juror." Two of the eight pages of that document were devoted to that argument.

(Parenthetically, in federal courts sitting in Tennessee, the federal judge is not the seventh juror, at liberty to set-aside the verdict of the jury when dissatisfied with it. Werthan Bag Corp. v. Agnew, 202 F.2d 119, 122 [3] (6th Cir. 1953).)

See United States v. Grinnel Corp., 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966); Berger v. United States, 255 U.S. 22, 31, 41 S.Ct. 230, 232, 65 L.Ed. 481 (1921). ***" Bradley v. Milliken, 620 F.2d 1143, 1157 [7] (6th Cir. 1980). The other federal disqualification statutes mentioned, supra, was described by the Supreme Court thusly:

> It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse ruling made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause.

Ex parte American Steel Barrel Co., 230 U.S. 35, 33 S.Ct. 1007, 1010, 57 L.Ed. 1379 (1913). Read in pari materia, §455 is to be accorded the same purpose here as was accorded §144 there.

In point-of-fact, all the affiants adduced facts, as opposed to arguments, bearing on the question of extra-judicial conduct of the trial judge herein.

I

A.

The first of these relates to the claim of the plaintiff that the trial judge should have disqualified himself because of his admission that, in the private practice of law, he served as lawyer in this matter in controversy. If so, it cannot be questioned that the trial judge must have recused himself as disqualified herein. 28 U.S.C. §455 (b)(2), supra; United States v. Amerine, 411 F.2d. 1130, 1133 [4] ("[T]he language of the statute is mandatory. As to this feature of the statute, prejudice is presumed whether actually present or not.") "*** The proper test, it has been held, is whether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the judge himself or even necessarily in the mind of the litigant filing the motion under 28 U.S.C. §455 [,supra,] but rather in the mind of a reasonable man. ***" United States v. Cowden, 545 F.2d 257, 265 (5th Cir. 1976), cert.den.

430 U.S. 909, 97 S.Ct. 1181, 51 L.Ed.2d 585 (1977). (Emphases added by the present writer.)

The transcript of the record of pretrial statements herein reflects that the trial judge did indeed say in open court in the absence of the jury:

> "***[A]s a lawyer prior to my assuming the bench, I at one time represented the defendant First American National Bank in this cause ***."

However, the charge of Mr. Phinney, that the trial judge was partial to the defendant bank because he, as a lawyer in private practice, had represented it in this very matter in controversy, is not grounded on the true facts; those facts are:

Prior to becoming such, the trial judge, had given legal counsel to the defendant bank. The Court notices judicially: that the trial judge had served earlier in the General Assembly (legislature) of Tennessee, as its state treasurer, and sought statewide the nomination of his political party as Governor of Tennessee; and that, in the Constitutional Convention of Tennessee of 1978, an issue was the then-existing limitation on the legal rate of interest in this State.

It was shown factually herein that the trial judge had represented the interest of the banking industry of this State during the course of such Convention, in which such legal-interest limitation relative to that increase was to be considered by the General Assembly of Tennessee in 1979 and thereafter. In this connection, the trial judge was engaged by the defendant bank, effective March 15, 1978, to conduct a research-project regarding permissible future legislation under the revised Constitution and to advise the defendant as to its proper handling of its lending contracts, and its proper revised practices under such revision and the prospective legislative enactments related thereto. That employment ceased on July 15, 1978, which, as this Court notices also judicially, was some six weeks before the trial judge was inducted into office as such on August 25, 1978, and this trial commenced within 60 days of such induction.

The sworn statements in the affidavit of the executive vice president of the defendant bank are specific that, after July 15, 1978, the trial judge

"was not thereafter employed by First American National Bank, its holding company, or any affiliated enterprise. *** At no time during his employment was he ever consulted with, or given information about, the matter of Don Ray Phinney vs. First American National Bank. *** [i.e., this] matter has been handled since its commencement by Bass, Berry & Sims."

The exclusivity of such law-firm's representation of the defendant bank was confirmed by Robert J. Walked, Esq., a member thereof, in his affidavit herein, who stated therein inter alia:

"I have represented First American National Bank of Nashville in the captioned [this titled] matter since the first Phinney lawsuit was brought in December, 1971.

* * * * * *

"*** No attorney other than me, my partners and associates have ever been involved in representing First American National Bank in this matter. *** I am confident that Judge Wiseman never ever knew about Phinney vs. First American National Bank until it showed up on his court docket. I believe Judge Wiseman intended his comment *** simply to identify First American as the defendant in this cause, and not to indicate that he had ever represented First American in this cause."

This was the understanding also of the trial judge's foregoing comment on the part of Gareth Aden, Esq.,

who was Mr. Phinney's trial counsel herein. He stated inter alia:

> "*** The reference *** to the effect that the judge had at one time represented First American 'in this cause' is in my belief incorrect, and I understood his statement at the time to mean that First American National Bank was a party in this cause, not that he had ever represented that bank in this cause. ***"

The distinct probabilities are that this is true: that Judge Wiseman indulged faulty sentence-structure in a redundant manner in his oral pretrial statement and intended merely to convey the meaning:

> [A]s a lawyer prior to my assuming the bench, I at one time represented the defendant First American National Bank -- [which is the defendant] in this [very] cause ***.

It is inconceivable to this Court that, even as a neophyte trial judge, a person with Judge Wiseman's credentials as a public servant, a practicing lawyer of many years, and as a judge, would have presided over the trial herein had it been in his mind that, in private practice, he had served as a lawyer in this very matter in controversy. In spite of his ostensible statement to the contrary, this Court hereby FINDS that he

did not.

B.

It is conceded by all that the defendant bank is owned by a bank-holding company, the First Amtenn Corporation (now, First American Corporation), which acquired also the stock of the First National Bank of Tullahoma. In making his disclosure of his former representation of the defendant bank, Judge Wiseman revealed also:

> "[A]t another time prior to 1971, I represented what at that time was an independent bank, First National Bank of Tullahoma, for a brief period of time, which has now subsequently -- I think 1973 or '74 -- become part of the First Amtenn system. ***"

Both as to Judge Wiseman's former representation of the defendant bank, as well as his prior representation of another bank which has since been acquired by the bank-holding company which owns both, his "*** prior representation of a party *** with regard to *** matter[s] unrelated to the litigation before him d[id] not automatically require recusal, 28 U.S.C. §455 (1970). [Footnote reference omitted.] Carr v. Fife, 156 U.S. 494, 498, 15 S.Ct. 427, 39 L.Ed. 508 (1895);

Darlington v. Studebaker-Packard Corp., 261 F.2d 903, 906-07 (7th Cir. ([1959]), cert.denied, 359 U.S. 922, 79 S.Ct. 1121, 3 L.Ed.2d 980 (1959); see Laird v. Tatum, 409 U.S. 824, 93 S.Ct. 7, 34 L.Ed.2d 50 (1972) (Rehnquist, J.) ***." National Auto Brokers v. Gen. Motors Corp., 572 F.2d 953, 958 [2] (2d Cir. 1978); see also United States v. Holdeman, 559 F.2d 31, 38 [204] (D.C. Cir. 1976). However, "*** if his relation with the client [wa]s a close one, the judge's impartiality might be questioned ***," 13 Wright, Miller & Cooper, Federal Practice and Procedure 371: Jurisdiction §3549, and under the general impartiality standard of 28 U.S.C. §455 (a), he might have been disqualified because he had "*** had a long association with a party as counsel, even on matters not involved in the[se] proceedings. See §3549 ***," ibid., at 357, n. 4, §3544.

The Court hereby FINDS that Judge Wiseman's association with his (former) hometown bank was, in his words, "*** for a brief period of time ***"; that his association with the defendant bank was for a period of only four months; and that circum-

stances relating to those associations were not extant which required his disqualification herein mandatorily.

II

The second reason Judge Wiseman was required mandatorily to have disqualified himself herein, as advanced by Mr. Phinney, is that the trial judge knew pretrial that he, individually or as a fiduciary,[4/] or his wife had a financial interest in the subject-matter in controversy. 28 U.S.C. §455 (b)(4), supra. The precise nature of such "financial interest" therein is difficult to "track" from the plaintiff's motion and accompanying memorandum.

A.

It is assumed that Mr. Phinney read bias and prejudice against him and partiality in favor of the defendant bank, or its holding company, from the following disclosure of Judge Wiseman:

[4/] This record is utterly devoid of any data whatever to support the plaintiff's assertion that the trial judge knew pretrial of some financial interest he had of a fiduciary nature in the outcome of the subject-matter herein. "'[F]iduciary' includes such relationships as executor, administrator, trustee, and guardian ***," for the purposes of this disqualification statute. 28 U.S.C. §455(d)(3).

"I do my personal banking business with First National Bank of Tullahoma, and have for thirty years, and it is now a part of the First Amtenn system. ***"

"*** [T]he fact that the judge is a depositer in a bank which is [even indirectly] a party to an action before him, standing alone, *** [is not] *** sufficient to [have] require[d] disqualification. ***" North Carolina National Bank v. Gillespie, 28 N.C.App. 237, 220 S.E.2d 862, ___, [4] (1976.[5/]

Here, Judge Wiseman's association with his hometown bank was and is of long duration, perhaps, even "close'; but that circumstance would not seem to have required his disqualification herein. "*** The relationship of bank and depositor is that of debtor and creditor, founded upon contract. The bank has the right and duty under that contract to honor checks of its depositor properly drawn and presented, absent a revocation that gives the bank notice prior to the time the checks are accepted or paid by the bank. ***"

[5/] Were that rule otherwise, the undersigned judge would be disqualified herein as a depositor of most recent vintage of the First American Bank, N. A., understood to be the successor to the defendant-bank and part and parcel of the First American Corporation, supra.

Bank of Marin v. England, 385 U.S. 99, 87 S.Ct. 274, 276 [4], [5], 17 L.Ed.2d 197 (1966); see also Anderson Nat. Bank v. Luckett, 321, U.S. 233, 64 S.Ct. 599, 607 []6], 88 L.Ed.2d 692 (1944) (A bank is obligated to pay "*** the chose in action of the depositor against the bank in accordance with the terms of the deposit.") Rather than rendering the depositor beholden to the caprice of the bank, the bank is the agent of the depositor and owes its depositor "*** the duty of loyalty which every agent owes its principal. ***" Third Nat. Bank in Nashville v. Carver, 31 Tenn.App. 520, 218 S.W.2d 66, 70 [8] (C.A.Tenn. 1948), cert. den. by the Supreme Court of Tennessee (1949).

This Court hereby FINDS nothing in the circumstance of Judge Wiseman's contractual relationship as a depositor of a bank, the stock of which is held by the same bank-holding company which holds the stock of the defendant-bank, which required mandatorily his disqualification herein.[6/]

6/ It would seem that Judge Wiseman's announcement had done his "personal banking business" with such institution over a 30-year period might have prompted further inquiry of counsel as to the place he and his wife had borrowed money to buy their home.

B.

Mr. Phinney exhibited with his affidavit herein reproduced copies of certificates therefor, reflecting that Judge Wiseman had owned at one time 200 shares of the stock of First Amtenn Corporation, supra. It hereby is FOUND that Judge Wiseman did not disclose his former financial interest therein, but that such ownership had ceased pretrial, viz., on August 22, 1978.

The "financial interest" which requires a judge mandatorily to disqualify himself sua sponte or otherwise refers to a present ownership at the pertinent time "*** of a legal or equitable interest, however small ***," with certain exceptions irrelevant to this consideration. 28 U.S.C. §455 (d), (4), supra; cf. Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 441 [2], 71 L.Ed. 749 (1927) (where it was held a violation of the Constitution, Fourteenth Amendment, Due Process Clause, for a judge to subject the liberty or property of a criminal defendant to the judgment of a Court, "*** the judge of which has [emphasis added by this writer] a direct, personal, substantial pecuniary

interest in reaching a conclusion against him in his case.")

The Court FINDS Judge Wiseman had no financial interest implicating directly or indirectly the defendant-bank during the progress of this litigation.

C.

Mr. Phinney exhibited with his affidavit herein a reproduced copy of the deed of trust of Judge Wiseman and his wife on their improved real estate in Davidson County, Tennessee, pledging it as collateral security for their repayment of a certain loan of money to them by the First National Bank of Tullahoma of April 6, 1977. It hereby is FOUND that the trial judge did not disclose pretrial that such loan was outstanding when this trial commenced.

This Court hereby FINDS further that the circumstance of this borrowed money and the pledging of such security would not seem in retrospect to have required mandatorily his disqualification herein. All that loan imports is his and his wife's borrowing money with their promise to re-

deem it. Nichols v. Fearson, 7 Pet. (US) 103, 8 L.Ed. 623 (1838).

"*** Formal bank loans are usually made on the basis of applications therefor and financial statements by the applicants. ***" 10 Am.Jur.2d 656, Banks, §683. "*** 'All *** deeds of trust, howsoever drawn, are deemed in equity as mere securities, notwithstanding any stipulations that the title is to become absolute on certain conditions; and such conveyances constitute mere liens, and must be enforced as such.' No fault can be found with this text [Gibson's Suits in Chancery] because those principles are well settled. Ehert v. Chapman, 67 Tenn. 27. ***" Walker v. Wood, 31 Tenn.App. 196, 213 S.W.2d 523, 526 [3] (C.A. Tenn. 1948), cert.den. by the Supreme Court of Tennessee (1948). This Court discerns no superior or inferior position of the lender or the borrowers in these circumstances; the parties' contract is a matter of memorandum between them, and the lender, as a national bank when the loan was negotiated, was subject to all the prohibitions, powers and duties of a member-bank of the Federal

Reserve System, see 12 U.S.C. ch. 3, in making the loan to Judge and Mrs. Wiseman relating to their improved real estate. First Nat. Bank v. Anderson, 269 U.S. 341, 46 S.Ct. 135, 140 []2], 70 L.Ed. 295 (1926).

The Court hereby FINDS that neither Judge Wiseman nor Mrs. Wiseman had any financial interest whatsoever in the subject-matter here in controversy.

As the Supreme Court observed in Ex parte American Steel Barrel Co., supra, 28 U.S.C. §455, supra, was never intended to require the disqualification of a trial judge to enable a discontented litigant to rid himself or herself of a judge whose adverse rulings are reviewable. Herein, the jury returned a verdict for Mr. Phinney and against the defendant bank and awarded him compensatory damages of $999,999 as well as punitive damages of $250,000 -- an aggregate of only $1 less than a million-and-a-quarter dollars. Judge Wiseman was required, as any other judge in this Circuit would also have been required, to determine the timely motion of the defendant bank,

for entry of a final judgment for it notwithstanding the verdict of the jury, Rule 50 (b), Federal Rules of Civil Procedure, under this standard enunciated in Morelock v. NCR Corp., supra, 586 F.2d at 1086 (6th Cir. 1978).

Mr. Phinney disagreed with Judge Wiseman's application of that standard and now states: "*** Plaintiff's counsel noted in his opening brief the effect which the trial judge's lack of impartiality had in rendering a decision on the judgment notwithstanding the verdict when he noted that in ruling on the [d]efendant's motion the Court weighed the evidence, viewed it in a light most unfavorable to the [plaintiff, and drew all inferenced [sic: inferences] against the [p]laintiff. This act of trial Court [sic] clearly violated the controlling law to be followed by a judge in ruling on a motion for judgment notwithstanding the verdict:", setting forth then the standard contained in Morelock, supra.

Evidently, our Court of Appeals-panel was no more impressed with this oblique reference to judicial impartiality or a perversion of justice than is

the undersigned judge; for that panel, not only affirmed Judge Wiseman's final judgment for the defendant bank, but stated he was correct in citing and applying in his "*** well-reasoned ***" opinion the standard of Morelock and affirmed the judgment herein specifically "*** for the reasons set forth in the careful and thorough memorandum of Judge Wiseman dated July 6, 1979." See Don Ray Phinney, plaintiff-appellant, v. First American National Bank, defendant-appellee, order of C.A. 6th of March 18, 1981 in no. 79-1372. The undersigned judge is hard put to understand how the following of the applicable law by Judge Wiseman could now be said, after the fact, to have resulted from his partiality in favor of the defendant-bank after he had failed to disqualify himself herein.

"*** The basis for a disqualification for lack of impartiality must be reasonable. ***" S. J. Groves & Sons v. Intern. Bro. of Teamsters, 581 F.2d 1214, 1246 [7]. The Judiciary Committee of the United House of Representatives, in considering the enactment of 28 U.S.C. §455, supra, said as much:

> *** Disqualification for lack of impartiality must have a reasonable basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not to face a judge where there is a reasonable question of partiality, but they are not entitled to judges of their own choice.

H.R.Rep.No. 93-1453, supra, at 5, reprinted, supra, at 6315, 6355.

The plaintiff knew, or should have know, when he interposed his motion under Rule 60 (b)(6), supra, and requested Judge Wiseman to disqualify himself at this late date, that his motion would be decided by another judge when Judge Wiseman did so. Cf. United States v. Will, supra, 101 S.Ct. at 479 [3] ("In federal courts generaly when an individual judge is disqualified from a particular case by reason of §455, the disqualified judge simply steps aside and allows the normal administrative processes of the court to assign the case to another judge not disqualified.") By that process, his motion is now assigned for determination by the undersigned judge. "*** It is only in exceptional or

extraordinary circumstances that district courts will grant the relief contemplated by Rule 60(b)(6), supra. Ackermann v. United States (1950), 340 U.S. 193, 202, 71 S.Ct. 209, 95 L.Ed. 207, 212 (headnote 3); Klapport v. United States (1949), 335 U.S. 601, 613, 69 S.Ct. 384, 93 L.Ed. 266, 276 (headnote 5); John E. Smith's Sons Co. v. Latimer Foundry and Mach. Co., C.A.3d (1956), 238 F.(2d) 815, 817 [5]. ***" Silvers v. TTC Industries, Inc., 395 F.Supp. 1318, 1321 [1] (per Neese, J., E.D.Tenn.), affirmed 513 F.2d 632 (6th Cir. 1974). The plaintiff could have chosen to seek relief in an unexceptional and ordinary manner by assigning as error on his appeal herein his claim that Judge Wiseman was required mandatorily to recuse himself sua sponte. Davis v. Board of School Com'rs of Mobile County, supra, 517 F.2d at 1051 [9], citing (in this context) United States v. Seiffert, 501 F.2d 974 (5th Cir. 1974), and Shadid v. Oklahoma City, 494 F.2d 1267, 1268 [3] (10th Cir. 1974); he cannot be relieved of that choice now "*** because hindsight seems to indicate to him that his decision not to [assign the trial judge's failure to disqualify himself sua

sponte on his] appeal was probably wrong ***. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from. ***" [7/] Ackermann v. United States, supra, 71 S.Ct. at 211-212 [3]; Cf. Polites v. United States, 24 F.R.D. 401 (D.C. Mich. 1968), affirmed, 272 F.2d 709 (6th Cir. 1969), cert.grant. 361 U.S. 958, 80 S.Ct. 202, 4 L.Ed.2d 541 (1960), affirmed, 364 U.S. 426, 81 S.Ct. 202, 5 L.Ed.2d 173 (1960).

Whether Judge Wiseman should have disqualified himself, acting sua sponte or after an objection, addressed itself to his judicial discretion. Woodruff v. Tomlin, 593 F.2d 33, 44 (6th Cir. 1979), after hearing en banc, 616 F.2d 924 (1980), cited in City of Cleveland v. Krupansky, 619 F.2d 576, 579 (6th Cir. 1980). The standard of review here is whether his failure to act sua sponte was an abuse of that discretion. S. J. Groves & Sons v. Intern. Bro. of Teamsters, supra, 581 at F.2d at 1246.

[7/] Mr. Phinney, as Mr. Ackermann had, offered their "reasons" why their respective choices were not "free" and "deliberate".

Because of the size of the judgment Mr. Phinney was awarded by a jury before its verdict was vacated and set-aside, as the trial judge was bound to do under the applicable law (as witnessed by the appellate affirmance of that action), and the obvious discontent of the losing litigant, the undersigned judge has delved deeply into all the pertinent ramifications presented by the plaintiff's present motion. Having done so, it is the opinion of this Court that there were no circumstances reasonably requiring Judge Wiseman to have recused himself herein sua sponte; he had made it clear at the outset that he would disqualify himself if confronted with any objection from either party herein, and none was made until post-trial and appeal.

Therefore, it hereby is CONCLUDED that Mr. Phinney's post-judgment challenge of the purported impartiality of Judge Wiseman lacks substantial merit and, in some respects, borders on the frivolous. Federal district judges were forewarned by the U. S. House Judiciary Committee to require a reasonable showing before indulging dis-

qualification under 28 U.S.C. §455, supra, when it was under consideration, stating inter alia:

> in assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. ***

H.R.Rep.No. 93-1453, supra, at 5, reprinted, supra, at 6315, 6355. Mr. Phinney did not make the requisite showing. It hereby is FOUND: that Judge Wiseman did not abuse the discretion reposited in him as a jurist; that the plaintiff Mr. Phinney pursued his claim against the bank in a fair forum; and that there are no reasons shown by him justifying his being relieved from the final judgment herein of this Court.

Therefore, the motion of the plaintiff of August 26, 1982, to be relieved of the final judgment herein of June 1, 1979 hereby is DENIED.

ENTER:

(C.G. Neese)
United States Senior Judge
District Judge by designation
and assignment